

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-2144

To be argued by
RICHARD J. KLEIN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

KENDALL BROWN,

Petitioner-Appellant,

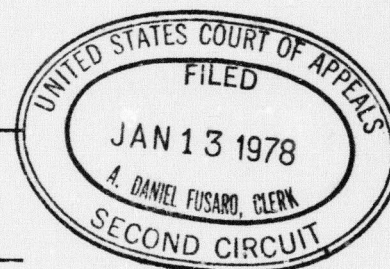
-against-

JOHN WILMOT, Superintendent of
Elmira Correction Center, and
LOUIS J. LEFKOWITZ, Attorney
General of the State of New York,

Respondents-Appellees.

B
pgs
Docket No. 77-2144

BRIEF FOR APPELLANT
KENDALL BROWN



ON APPEAL FROM AN ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

RICHARD J. KLEIN
Attorney for Appellant
KENDALL BROWN
909 Sheridan Avenue
Bronx, New York 10451
(212) 992-8134

TABLE OF CONTENTS

	page(s)
Table of Contents	1
Table of Cases	ii,iii
Table of Statutes	iv
Questions Presented	1
Statement Pursuant to Rule 28 (a)(3)	
Preliminary Statement	2
Statement of Facts	2-3
The Ruling Below	4
ARGUMENT	
I KENDALL BROWN HAS EXHAUSTED ALL STATE COURT REMEDIES.	
A. No Appeal Lies.	5
B. No Relief under Article 78	5-6
C. State Habeas Corpus Unavailable	7-8
II THE STANDARD OF REVIEW APPLIED BY THE DISTRICT COURT DOES NOT FAIRLY RECTIFY "HUMAN ERRORS" MADE IN EVALUATING APPLICATIONS FOR BAIL PENDING APPEAL.	
A. Bail Pending Appeal in New York	9
B. A Choice of Two Standards.	10
C. The Test for the Standard.	11
D. No Government Interest in Summary adjudication.	12
CONCLUSION	12
ADDENDUM	13-17

TABLE OF CASES

<u>Abbot v. Laurie</u> , 422 F.Supp. 976 (D.R.I. 1976)	9, 10
<u>Coralluzzo v. New York State Parole Board et al.</u> ,	
<u>— F. 2d —</u> , Doc. No. 76-7517, Slip op. 659	
(2d Cir. July 1977), <u>cert. granted</u> , 22 CrL 4133....	12
<u>Goldberg v. Kelly</u> , 397 U.S. 254 (1970)	11
<u>Matter of Abraham v. Justices of the Supreme</u>	
<u>Court of Bronx County</u> , 37 N.Y. 2d 560 (1975).....	6
<u>Matter of Lefkowitz v. Cioffi</u> , 46 A.D. 2d 473	
(1st Dept. 1975).....	5-7
<u>Matter of Proskin v. County Ct. of Albany County</u> ,	
30 N.Y. 2d 15 (1972).....	6
<u>Matter of Rogers v. Leff</u> , 45 A.D. 2d 630	
(1st Dept. 1974).....	5,6
<u>Matter of State of New York v. King</u> , 36 N.Y.2d 59	
(1975).....	6
<u>Morrissey v. Brewer</u> , 408 U.S. 471 (1972).....	11
<u>Natal v. People of Puerto Rico</u> , 424 F.Supp. 1082	
(D.P.R. 1975).....	10
<u>People of the State of New York ex rel.</u>	
<u>Epton v. Nenna</u> , 25 A.D. 2d 518 (1st Dept. 1966)..	6,7
<u>People of the State of New York ex rel.</u>	
<u>Klein v. Krueger</u> , 25 N.Y. 2d 497 (1969).....	5,7
<u>Roberson v. State of Connecticut</u> , 501 F. 2d 305	
(2d Cir. 1974).....	9

<u>Starkey v. Swenson</u> , 370 F.Supp. 594 (E.D.Mo 1974).....	10
<u>United States ex rel. Abate v. Malcolm</u> ,	
397 F.Supp. 715 (E.D.N.Y. 1975).....	10
<u>United States ex rel. Bad Heart Bull v. Parkinson</u> ,	
381 F.Supp. 985 (D.S.D. 1974).....	10
<u>United States ex rel. Carmona v. Ward</u> ,	
416 F.Supp. 272 (S.D.N.Y. 1976).....	7,8
<u>United States ex rel. Goodman v. Kehl</u> ,	
455 F. 2d 863 (2d Cir. 1972).....	9
<u>United States ex rel. Johnson v. Chairman, New York</u>	
<u>State Board of Parole</u> , 500 F. 2d 925 (2d Cir.),	
<u>vacated as moot</u> , 419 U.S. 1015 (1974).....	11-12
<u>United States ex rel. Kane v. Bensinger</u> ,	
359 F.Supp. 181 (N.D.Ill.,E.D. 1972).....	10
<u>United States ex rel. Keating v. Bensinger</u> ,	
322 F.Supp.784 (N.D.Ill.,1971).....	10
<u>United States ex rel. Walker v. Twomey</u> ,	
484 F. 2d 874 (7th Cir. 1973) (<u>per curiam</u>).....	9, 10
<u>Wolf v. McDowell</u> , 418 U.S. 562 (1974).....	11

TABLE OF STATUTES

United States Constitution

Eighth Amendment	1-4,9,10,12
Fourteenth Amendment	1-4,9,10,12

Title 28, United States Code

§2254	1-3
§2253	2-4

Federal Rules of Appellate Procedure

Rule 22(b)	2,4
Rule 28 (a)(3)	2

New York Penal Law

§160.15	2
---------	--------

New York Criminal Procedure Law

§460.10 -1 (a)	3
§460.50	3,5,6,9
§510.30	6, 10
§530.50	9

New York Civil Practice Law Rules

Article 70	6
Article 78	5,6
§7801-2	5

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

KENDALL BROWN,

Petitioner-Appellant,

-against-

JOHN WILMOT, Superintendent of
Elmira Correction Center, and
LOUIS J. LEFKOWITZ, Attorney
General of the State of New York,

Respondents-Appellees.

Docket No. 77-2144

BRIEF FOR APPELLANT
KENDALL BROWN

ON APPEAL FROM AN ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Did Kendall Brown exhaust his state remedies under 28 U.S.C. §2254(b) and (c) to properly invoke the habeas corpus jurisdiction of the district court?

2. Is a state judge's denial of bail pending appeal without stated reasons a violation of due process of law under the Eighth and Fourteenth Amendments to the United States Constitution?

STATEMENT PURSUANT TO RULE 28(a) (3)

PRELIMINARY STATEMENT

This appeal by Kendall Brown from an order of the United States District Court for the Southern District of New York (The Honorable Henry F. Werker) entered on October 14, 1977, denying a writ of habeas corpus (28 U.S.C. §2254) challenging a state judge's denial of bail pending appeal proceeds by way of a certificate of probable cause granted below (28 U.S.C. §2253 and F.R.A.P. Rule 22(b)). Kendall Brown is now serving a state prison term not to exceed seven years.

STATEMENT OF FACTS

Seventeen year old Kendall Brown was arrested on December 24, 1974 (A*,4). After preliminary proceedings in Bronx Criminal Court, he was indicted and charged in the Supreme Court of the State of New York for the County of Bronx with acting in concert with others in a knife point robbery (A,5). For twenty eight months he was at liberty on \$750 bail awaiting trial (A,5). On May 3, 1977, he was convicted by a jury of robbery in the first degree, a B felony under New York Penal Law §160.15 (McKinney 1965), despite testifying in his own behalf to his innocence (A,5,8). On June 13, 1977, he was sentenced by the trial justice to state prison for not

* A refers to the joint appendix.

more than seven (0-7) years (A,5). A timely notice of appeal (A,3) of the judgment of conviction was filed pursuant to New York Criminal Procedure Law* §460.10-1(a) (McKinney 1971).

On June 27, 1977, Kendall Brown filed a written motion on notice with an affirmation (A,4-11), exhibits (R**, #12), and a memorandum (A,12-33) to a justice of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, pursuant to N.Y.C.P.L. §460.50 (McKinney 1971) seeking bail pending appeal. The Assistant District Attorney filed an affirmation and memorandum in opposition (A,34-43) to which Kendall Brown filed a reply memorandum (A, 44-56). On July 21, 1977, based on the submitted papers***, Associate Justice Harold Birns entered an order denying bail pending appeal without stating any reasons for his action (A, 57).

On August 31, 1977, Kendall Brown filed a petition for a writ of habeas corpus (R, #2) pursuant to 28 U.S.C. §2254 in the Southern District of New York. He argued that the denial of bail pending appeal without stated reasons for the denial violated due process of law under the Eighth and Fourteenth Amendments to the United States Constitution. The Assistant Attorney General argued both the jurisdictional issue of exhaustion of state remedies and the merits of the issue.

* Hereinafter abbreviated N.Y.C.P.L..

** R refers to the record on appeal.

*** The reference in the form order to hearing refers to the memoranda since there was no oral presentation.

THE RULING BELOW

After finding that Kendall Brown had exhausted his state remedies (A,59), Justice Werker ruled that a denial of bail pending appeal without stated reasons was not per se arbitrary action in violation of due process under the Eighth and Fourteenth Amendments to the United States Constitution (A,61). He commented that both sides have made non-frivolous arguments about the appeal (A,62). He found the nature of the charge in an of itself provided a sufficient rational basis to sustain Justice Birns denial without stated reasons under the standard of review he found applicable (A,60).

On November 14, 1977, Justice Werker signed an order granting a certificate of probable cause (A, 2-NR.10) pursuant to 28 U.S.C. §2253 and F.R.A.P. Rule 22(b) permitting Kendall Brown to appeal his order to this Court.

ARGUMENT

Point I

KENDALL BROWN HAS EXHAUSTED
ALL STATE COURT REMEDIES.

A. No Appeal Lies.

§460.50-3 of the N.Y.C.P.L. (McKinney 1971) allows only one application for bail pending appeal. There is no provision by statute for an appeal of an order denying such an application. People of the State of New York ex rel. Klein v. Krueger, 25 N.Y. 2d 497, 501 (1969); Matter of Lefkowitz v. Cioffi, 46 A.D. 2d 473, 474 (1st Dept. 1975); Matter of Rogers v. Leff, 45 A.D. 2d 630, 631 (1st Dept. 1974).

B. No Relief Under Article 78.

It has been suggested below that a proceeding pursuant to New York Civil Practice Law Rules* Article 78 (McKinney 1962) may be available to review Kendall Brown's claim. This assertion is inaccurate. Under the article §7801-2 specifically provides that this proceeding does not apply to a criminal matter.

There is an exception to this statutory limitation which is discretionally invoked when a court attempts to act in an area without subject matter jurisdiction, or having juris-

* Hereinafter abbreviated N.Y.C.P.L.R..

diction it exceeds its authorized powers. Matter of Abraham v. Justices of the Supreme Court of Bronx County, 37 N.Y. 2d 560, 564 (1975); Matter of Proskin v. County Ct. of Albany County, 30 N.Y. 2d 15, 20 (1972). Strong policy exists against discretionary review despite clear violation. Matter of the State of New York v. King, 36 N.Y. 2d 59 (1975).

Matter of Rogers v. Leff, supra, held article 78 was proper against a justice who granted bail pending appeal after conviction for an offense for which bail pending appeal was prohibited by statute. Kendall Brown's claim does not fall into either the exceptions or the statute. Justice Birns had both the statutory authority to entertain the application under N.Y.C.P.L. §460.50-2(a)(1) (McKinney 1971), and the discretionary power to deny the application under N.Y.C.P.L. §510.30 (McKinney 1971). Kendall Brown has no basis to proceed under this article.

C. State Habeas Corpus is Unavailable.

A habeas corpus proceeding pursuant to article 70 of the N.Y.C.P.L.R. (McKinney 1963) will lie to consider a denial of bail only where the relator has a constitutional right to such bail. People of the State of New York ex rel. Epton v. Nenna, 25 A.D. 2d 518 (1st Dept. 1966); Matter of Lefkowitz v. Cioffi, supra at 475.

Under New York law, habeas corpus will not lie to consider an abuse of discretion in a denial of bail pending

appeal. People of the State of New York ex rel. Epton v. Nenna, supra; Matter of Lefkowitz v. Cioffi, supra at 475. This is the law although a claim of abuse of discretion on bail must be considered by New York courts within the constitutional limitations on discretion. People of the State of New York ex rel. Klein v. Kruger, supra at 501.

United States ex rel. Carmona v. Ward, 416 F.Supp. 272, 275 (S.D.N.Y. 1976), suggested a possible interpretation of New York law might allow habeas corpus review to attack the constitutionality of a statute that made relator ineligible for bail pending appeal. The court knowingly disregarded an unreported lower court New York decision directly on point that was inopposite to reach its conclusion.

Assuming arguendo that this case was decided correctly, it would still not purport to extend New York's habeas corpus to a case where relator argues an unconstitutional abuse of discretion, as opposed to the unconstitutionality of a statute preventing the exercise of discretion in bail pending appeal. Any other interpretation would result in the bootstrapping of People of the State of New York ex rel. Epton v. Nenna, supra, through the vehicle of United States ex rel. Carmona v. Ward, supra, to overrule itself!

Kendall Brown's claim that Justice Birns was arbitrary in the manner in which he exercised his discretion denying the application for bail pending appeal may not be brought in a state habeas corpus proceeding even if the holding of

United States ex rel. Carmona v. Ward, supra, is accepted
as the law by this Court.

Point II

THE STANDARD OF REVIEW APPLIED
BY THE DISTRICT COURT DOES NOT
FAIRLY RECTIFY "HUMAN ERRORS"
MADE IN EVALUATING APPLICATIONS
FOR BAIL PENDING APPEAL.

Bail pending appeal is not a constitutional right within the Eighth Amendment to the United States Constitution. Roberson v. State of Connecticut, 501 F. 2d 305, 308 (2d Cir. 1974). However, when a state creates a provision for bail pending appeal, the arbitrary denial is a violation of due process of law under the Eighth and Fourteenth Amendments. United States ex rel. Walker v. Twomey, 484 F. 2d 874, 875 (7th Cir. 1973) (per curiam); Abbot v. Laurie 422 F.Supp. 976, 978 (D.R.I. 1976); Cf. United States ex rel. Goodman v. Kehl, 456 F. 2d 863, 868 (2d Cir. 1972).

A. Bail Pending Appeal in New York

The law of New York under N.Y.C.P.L. §460.50 (McKinney 1971) provides that bail pending appeal may be granted from a judgment of conviction. However, N.Y.C.P.L. §530.50 (McKinney 1971) prohibits the granting of bail pending appeal after conviction of an "A"* felony offense. In evaluating an appli-

* Class A felonies in New York include murder 1° & 2°, attempted murder 1°, kidnapping 1°, arson 1°. The sale, possession or attempted sale or possession of controlled substances in quantity are also included.

cation, N.Y.C.P.L. §510.30-2(b) (McKinney 1971) suggests that a finding that "the appeal is palpably without merit alone justifies, but does not require, a denial of the application...".

B. A Choice of Two Standards.

The resolution of the second question presented by this appeal depends entirely on how much procedural due process an applicant for bail pending appeal is entitled. There are two competing standards. Judge Werker applied the strictest one.

(1) A denial without stated reasons is arbitrary per se in violation of the Eighth and Fourteenth Amendments. United States ex rel. Abate v. Malcolm, 397 F.Supp. 715 (E.D.N.Y. 1975), vacated, 522 F. 2d 826 (2d Cir. 1975); Abbot v. Laurie, supra; United States ex rel. Bad Heart Bull v. Parkinson, 381 F.Supp. 985 (D.S.D. 1974); United States ex rel. Keating v. Bensinger, 322 F.Supp. 784, 787-8 (N.D.Ill.,E.D.1971).

(2) A denial will be sustained unless Kendall Brown proves that no rational reason appears on the face of the record for the denial. United States ex rel. Walker v. Twomey, supra; Natal v. People of Puerto Rico, 424 F. Supp. 1082, 1085 (D.P.R. 1975); Starkey v. Swenson, 370 F.Supp. 594, 596 (E.D.Mo. 1974); United States ex rel. Kane v. Bensinger, 359 F.Supp. 181, 184 (N.D.Ill.,E.D. 1972).

C. The Test for the Standard.

The Supreme Court established the relevant test for balancing the interests of the parties in situations of this kind in Goldberg v. Kelly, 397 U.S. 254, 262-3 (1970):

" The extent to which procedural due process must be afforded to the recipient is influenced by the extent to which he is 'condemned to suffer grievous loss' ... and depends upon whether the recipient's interest outweighs the governmental interest in summary adjudication."

Kendall Brown's loss of freedom even though it may be only conditional is grievous loss. Morrissey v. Brewer, 408 U.S. 471, 480-2 (1972); Wolf v. McDowell, 418 U.S. 562, 560 (1974).

D. No Government Interest in Summary Adjudication.

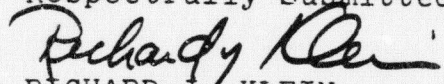
No free society can have an interest in hiding the basis for decisions where mistake or misunderstanding of an operative fact may deprive an individual of freedom. United States ex rel. Johnson v. Chairman, New York State Board of

Parole, 500 F. 2d 925 (2d Cir.), vacated as moot, 419 U.S. 1015 (1974); Coralluzzo v. New York State Parole Board et al., ___ F. 2d ___, Doc. No. 76-7517, Slip op. 659 (2d Cir. July 1977), cert. granted, 22 CrL 4113.

CONCLUSION

Kendall Brown has been denied bail pending appeal in violation of the Eighth and Fourteenth Amendments to the United States Constitution. He has exhausted all his state court remedies. The Court should grant a writ of habeas corpus but stay the enforcement of the writ for fifteen days to allow the Appellate Division First Department an opportunity to hold a new bail hearing and either grant a reasonable bail, or state the reasons on the record for the denial thereof. If a hearing is held within fifteen days the writ should be dismissed.

Respectfully Submitted,


RICHARD J. KLEIN
Attorney for Appellant
KENDALL BROWN
909 Sheridan Avenue
Bronx, New York 10451
(212) 992-8134

ADDENDUM

UNITED STATES CONSTITUTION

AMENDMENT EIGHT

Excessive bail, fines, punishments

Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

AMENDMENT FOURTEEN

§1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TITLE 28 UNITED STATES CODE

§ 2254. State custody; remedies in Federal courts

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

NEW YORK CRIMINAL PROCEDURE LAW

§ 460.50 Stay of judgment pending appeal to intermediate appellate court

1. Upon application of a defendant who has taken appeal to an intermediate appellate court from a judgment or from a sentence of a criminal court, a judge designated in subdivision two may issue an order both (a) staying or suspending the execution of the judgment pending the determination of the appeal, and (b) either releasing the defendant on his own recognizance or fixing bail pursuant to the provisions of article five hundred thirty. That phase of the order staying or suspending execution of the judgment does not become effective unless and until the defendant is released, either on his own recognizance or upon the posting of bail.

2. An order as prescribed in subdivision one may be issued by the following judges in the indicated situations:

(a) If the appeal is to the appellate division from a judgment or a sentence of either the supreme court or the New York City criminal court, such order may be issued by (i) a justice of the appellate division of the department in which the judgment was entered, or (ii) a justice of the supreme court of the judicial district embracing the county in which the judgment was entered;

(b) If the appeal is to the appellate division from a judgment or a sentence of a county court, such order may be issued by (i) a justice of such appellate division, or (ii) a justice of the supreme court of the judicial district embracing the county in which the judgment was entered, or (iii) a judge of such county court;

(c) If the appeal is to the appellate term of the supreme court from a judgment or sentence of the New York City criminal court, such order may be issued by a justice of the supreme court of the judicial district embracing the county in which the judgment was entered;

(d) With respect to appeals to county courts from judgments or sentences of local criminal courts, and with respect to appeals to appellate terms of the supreme court from judgments or sentences of any criminal courts located outside of New York City, the judges who may issue such orders in any particular situation are determined by rules of the appellate

division of the department embracing the appellate court to which the appeal has been taken.

3. An application for an order specified in this section must be made upon reasonable notice to the people, and the people must be accorded adequate opportunity to appear in opposition thereto. Not more than one application may be made pursuant to this section.

4. Notwithstanding the provisions of subdivision one, if within one hundred twenty days after the issuance of such an order the appeal has not been brought to argument in or submitted to the intermediate appellate court, the operation of such order terminates and the defendant must surrender himself to the criminal court in which the judgment was entered in order that execution of the judgment be commenced or resumed; except that this subdivision does not apply where the intermediate appellate court has (a) extended the time for argument or submission of the appeal to a date beyond the specified period of one hundred twenty days, and (b) upon application of the defendant, expressly ordered that the operation of the order continue until the date of the determination of the appeal or some other designated future date or occurrence.

5. Where defendant is at liberty during the pendency of an appeal as a result of an order issued pursuant to this section, the intermediate appellate court, upon affirmance of the judgment, must by appropriate certificate remit the case to the criminal court in which such judgment was entered. The criminal court must, upon at least two days notice to the defendant, his surety and his attorney, promptly direct the defendant to surrender himself to the criminal court in order that execution of the judgment be commenced or resumed, and if necessary the criminal court may issue a bench warrant to secure his appearance.

NEW YORK CRIMINAL PROCEDURE LAW

§ 510.30 Application for recognizance or bail; rules of
law and criteria controlling determination

1. Determinations of applications for recognizance or bail are not in all cases discretionary but are subject to rules, prescribed in article five hundred thirty and other provisions of law relating to specific kinds of criminal actions and proceedings, providing (a) that in some circumstances such an application must as a matter of law be granted, (b) that in others it must as a matter of law be denied and the principal committed to or retained in the custody of the sheriff, and (c) that in others the granting or denial thereof is a matter of judicial discretion.

2. To the extent that the issuance of an order of recognizance or bail and the terms thereof are matters of discretion rather than law, an application is determined on the basis of the following factors and criteria:

(a) With respect to any principal, the court must consider the kind and degree of control or restriction that is necessary to secure his court attendance when required. In determining that matter, the court must on the basis of available information, consider and take into account:

(i) The principal's character, reputation, habits and mental condition;

(ii) His employment and financial resources; and

(iii) His family ties and the length of his residence if any in the community; and

(iv) His criminal record if any; and

(v) His previous record if any in responding to court appearances when required or with respect to flight to avoid criminal prosecution; and

(vi) If he is a defendant, the weight of the evidence him in a pending criminal action and any other factor indicating probability or improbability of conviction; or in the case of an application for bail or recognizance pending appeal, the merit or lack of merit of the appeal; and

(vii) If he is a defendant, the sentence which may be or has been imposed.

(b) Where the principal is a defendant-appellant in a pending appeal from a judgment of conviction, the court must also consider the likelihood of ultimate reversal of the judgment. A determination that the appeal is palpably without merit alone justifies, but does not require, a denial of the application, regardless of any determination made with respect to the factors specified in paragraph (a).

NEW YORK CRIMINAL PROCEDURE LAW

§ 530.50 Order of recognizance or bail; during pendency
of appeal

A judge who is otherwise authorized pursuant to section 460.50 or section 460.60 to issue an order of recognizance or bail pending the determination of an appeal may do so unless the defendant received a class A felony sentence.

NEW YORK CIVIL PRACTICE LAW AND RULES

§ 7801. Nature of proceeding

Relief previously obtained by writs of certiorari to review, mandamus or prohibition shall be obtained in a proceeding under this article. Whenever in any statute reference is made to a writ or order of certiorari, mandamus or prohibition, such reference shall, so far as applicable, be deemed to refer to the proceeding authorized by this article. Except where otherwise provided by law, a proceeding under this article shall not be used to challenge a determination:

1. which is not final or can be adequately reviewed by appeal to a court or to some other body or officer or where the body or officer making the determination is expressly authorized by statute to rehear the matter upon the petitioner's application unless the determination to be reviewed was made upon a rehearing, or a rehearing has been denied, or the time within which the petitioner can procure a rehearing has elapsed; or

2. which was made in a civil action or criminal matter unless it is an order summarily punishing a contempt committed in the presence of the court.

COPY OF THE WITHIN PAPER
RECEIVED
DEC 10 1970

[Handwritten Signature]
ATTORNEY GENERAL